UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA,
Appellant,
vs.
CLARENCE W. ROBNETT, WILLIAM DWYER, and FRANK W. KETTENBACH,
Appellees.
No. 2209.

THE UNITED STATES OF AMERICA,
Appellant.
vs.
WILLIAM F. KETTENBACH, GEORGE H. KESTER, CLARENCE W. ROBNETT, WILLIAM DWYER, THE IDAHO TRUST COMPANY, A Corporation, THE LEWISTON NATIONAL BANK, a Corporation, THE CLEARWATER TIMBER COMPANY, a Corporation, ELIZABETH W. THATCHER, CURTIS THATCHER, ELIZABETH WHITE, EDNA. P. KESTER, ELIZABETH KETTENBACH, MARTHA E. HALLETT and KITTY E. DWYER,
Appellees.
No. 2210.

THE UNITED STATES OF AMERICA,
Appellant,
vs.
WILLIAM F. KETTENBACH, GEORGE H. KESTER and WILLIAM DWYER,
Appellees.
No. 2211.

Upon Appeals from the United States District Court for the District of Idaho, Central Division.

PETITION OF APPELLEES, WILLIAM F. KETTENBACH, GEORGE H. KESTER, WILLIAM DWYER, KITTY E. DWYER, THE LEWISTON NATIONAL BANK, A CORPORATION, THE IDAHO TRUST COMPANY, A CORPORATION, AND EACH OF THEM SEVERALLY, FOR A RE-HEARING.

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The appellees severally herein petition for a rehearing upon the following grounds:

I

From the bottom of page 11 and the top of page 12, the opinion of the Court relates to the testimony of Clarence W. Robnett, and among other things the Court says:

> "It is also true that his testimony is not altogether free from contradictions and misstatements, and were it not for the corroborating testimony of the entrymen, we should reject it altogether."

An examination of the record discloses that the Court held for cancellation certain patents wherein the testimony of the entrymen did not corroborate the evidence of Clarence W. Robnett, but is in direct conflict therewith, and we call the Court's attention to the evidence of Lon E. Bishop, Frederick W. Newman, Charles Dent and William McMillan, appearing on page 23 of the Court's opinion.

We call the Court's attention to the evidence of C. W. Colby appearing at pages 3080 to 3085, of the transcript, and especially page 3082, wherein the witness states:

> "A. Well, these entrymen were in the employ, had been for some time in the employ of Small & Emery, except perhaps Mr. Dent, who wasn't particularly employed by them, but had considerable dealings—he kept a house at which

they stopped in going and coming, and also kept some goods, and they got goods from him in go ing and coming from Lewiston to the timber, and these—there was a good deal of talk about taking to timber and these parties concluded that they wanted some, and Mr. Emery had been engaged in locating parties on timber, had made a business of it, and finally located them on timber."

(Page 3084). "A. Yes, sir; and asked him (meaning Mr. Kettenbach) for a loan of this money to prove up with, and I think he said he would speak to Mr. Kester about it, and let me know in a short time, or perhaps let me know in the morning; anyway, it was only a short time he took to give me an answer. * * * *

"A. I mean made proof; yes, sir. Excuse me. When they were ready for the money, I got the the money from the bank and handed it to them, and they went and made their proof."

MR. TANNAHILL: Then what happened after they made their proof?

"A. Well, Mr. Kettenbach says: 'Now,' he says, 'I look to you, Mr. Colby, to get those mortgages and see that this thing is all straight,' and so I waited around until they made their proof, and when they did, I asked them to go up to Mr. Barnett's office—I went up into Mr. Barnett's office before this, and told him the boys were making proof and I would like to have them give a mortgage, and told him I would like to have them remain in his office—it was getting late in the evening then—and I wanted him to remain there to fix up these mortgages and he said he would and did. * * ** Emery came up and says: "The boys want to sell instead of giving a mortgage. They say they will have the same trouble about meeting the mortgage they

are having now, and prefer to sell, if they think they can get a reasonable price," and asked me if I thought Mr. Kettenbach would buy it, and I says: 'I think not; it is so soon after proving up, but,' I says, 'I will go and see him.' I went and saw Mr. Kettenbach and he says: 'Have they proved up?' and I says, 'Yes.' 'Have they got their final receipts?' and I says, 'Yes.' 'Well,' he says, 'It is as much theirs now as it will ever be,' and he says, 'Yes. I will buy them if I can get them right,' and he says 'What will they cost?' and I says, 'They will average about $750 or a little less, some more.' 'Well,' he says, 'I will see Mr. Kester about it and let you know in a little while,' and I saw him again, and he says, 'We will take them if they don't cost more than $750,' so then I told Mr. Emery that Mr. Kettenbach would buy them, and what he would give, and Mr. Emery seemed to understand by that what the boys wanted for them, and instead of making mortgages they made deeds. (Page 3086 of the record).

(Page 3087). "Q. I will ask you if at the same time, or at any time, you stated to Mr. Kester, or anyone else, what the entrymen were doing, or that they were to go ahead and prove up, and deed the claims over to Colby and Emery, meaning yourself and Emery, for $200 each."

"A. No, sir; there was nothing of that kind. Nothing suggesting any such thing in the conversation at all.'

FRED W. EMERY,

We also call the Court's attention to the evidence of Fred W. Emery, appearing at pages 3115 to 3138 of the record. On page 3117 the witness testifies:

"Q. Now, just state what occurred in relation to the location of these parties on timber claims?

A. Why, these parties were all men, except Dent, that has worked for us for a number of years off and on, for—well, for the past probably 15 years. Evans probably a good deal longer than that, and at this time they were working the biggest part of the time for us in the woods. We were in the lumber business. * * * *

A. And I was doing some locating off and on, as I had time to cruise some timber and parties were anxious to get located, why I would locate a few of them; and I was up in the woods one day, and they were there at one of the homesteader's cabins, in fact, Evans' homestead, and they got talking about timber claims, about me locating people, and wanted to know if there was anything left, and I told them about a bunch of timber there was there; that is, there was about four of them there, I think, at that time; and they wanted to know if I thought it was worth taking, and I told them I thought it was, and they talked the matter over there during the afternoon among them and concluded they wanted to get located, and wanted me to locate them, and I told them I would as soon as I had a little time. The next—I came down early then, and when I came back they were there, and I took them and went over the timber with them and located them.

Q. And what occurred next?

A. Well, they came down to Lewiston and made their filings; and after that a short time they told me that they would have to get money —they would have to borrow money to prove up on these claims. Well, they wanted to know what I thought about it, and I told them I didn't think they would have any trouble in borrowing money; that there was lots of men in the country that was loaning money on timber claims, enough to prove up on, and they told me to look out for somebody that would be apt to have some, as they didn't know as they would have enough, and I told them I would. Well, it run on for some time then, and I spoke to Mr. Colby, as he was our book keeper at that time, and asked him if he knew of anybody that would be liable to loan them boys what money they would need on those claims for proving up, and he said he didn't right then, but he thought probably he could find them, and I told him to look around and see who they was; and some time after that he told me that Mr. Skinner—I think it was W. H. Skinner, that used to be mayor here, whatever his initials was—would loan them the money, but it proved—some short time before they got ready to prove up why Skinner's money didn't get there, and so there was no show to get it of him, and so I told him to see other parties, and he told me he would, and one day he said he was talking with Mr. Kester, I think, in regard to it,—

Q. Mr. Kester or Mr. Kettenbach?

A. I wouldn't be sure whether it was Kester and Kettenbach, or Mr. Kettenbach, but he said they hadn't decided whether they would loan it or not; and a short time after that Mr. Kettenbach, I think it was, called me in and wanted to know what I thought about this timber, if I had located it and cruised it, and if I knew what

there was on it. I told him I did, and he wanted to know if I thought a loan would be safe of $400.00 on it. I told him I thought it would be perfectly safe; while it wasn't first-class timber, it was second growth, and it would probably cut a couple of million feet to the quarter section, and I considered it safe to loan on it.

Q. Now, what happened next?

A. Well, it appears that he loaned the money on these claims; and after these boys had proved up there was several of them came to me and wanted to know if I didn't think these parties would buy the claims.

Q. Now, did they all prove up at the same time?

A. No; I think there was four proved up that day.

Q. And it was these four that came to you?

A. Yes.

Q. All right. What did you tell them?

A. Well, I told them I didn't know. They said they would rather sell their claims if they could get something reasonable for them instead of giving a mortgage on them, because they were all homesteaders in there, and they could use the money to good advantage to improve their homesteads with.

Q. And then what did you do?

A. Well, I spoke to Mr. Colby about it. I told him the boys would rather sell those claims out and out than to mortgage them, and to see what he could do about it, and I think he went and saw Messrs. Kester and Kettenbach, and they decided that they would buy the claims, providing they were all right.

Q. And when were they sold?

A. I think they were sold that day.

Q. And do you know anything about the sale of the other two claims?

A. No, I don't know about the arrangements for the sale of the other two claims.

Q. Now, was there any talk of the sale of these claims before they made their final proof?

A. No.

Q. Was there any understanding or agreement between you that they were to take these claims up for you?

A. None whatever.

Q. What location fee did they pay you?

A. They paid me $100.00.

Q. $100.00 for each claim?

A. Each claim.

Q. Are you acquainted with Clarence W. Robnett?

A. I am, yes, sir.

Q. How long have you known him?

A. Why, I think about fifteen years.

Q. I will ask you, Mr. Emery, if, the morning after the first conversation with Mr. Colby, between Mr. Colby and Mr. Kettenbach, relative to loaning the money on the claims, that you and Mr. Colby came into the office—William F. Kettenbach's private office—and talked the matter over, and you told Mr. Kester, or Mr. Kettenbach, or either of them, that you had checked these claims over, and you knew they were the best claims in the whole township that was subject to filing, and that Mr. Kester told Mr. Colby that they would go and furnish the money for the proof, and take the claims under the same conditions that you had with the entrymen, to pay them $200.00 for their right?

WITNESS: No; I never had any such conversation.

MR. TANNAHILL: Just answer the question.

A. Well, the way I understand the question—the way, I mean, that I never had any such

conversation, between Colby and I and Kettenbach, or Colby and I and Kester, because we never met there to talk that over—any matter of that kind.

Q. Did you ever have any conversation wherein you said you were to pay the entrymen $200.00 for their rights?

A. No, sir.

Q. Now, did you give the names of the entrymen at any conversation between Mr. Kettenbach and Mr. Kester, or Mr. Colby and yourself?

A. No, sir."

On pages 2122 to 2124 the witness testifies that he never had any conversation with Robnett, such as testified to by Robnett; that the evidence of Robnett in relation to all of the conversations concerning these particular tracts of land was and is false.

FREDERICK W. NEWMAN,

The evidence of Frederick W. Newman appears at pages 671 to 694 of the record, direct examination; 695 to 697 cross-examination; 698 to 700 redirect examination.

At page 674 the witness testifies on direct examination:

Q. Who spoke to you about taking up a timber claim?

A. I spoke to Mr. Emery; I asked him in this way: I says, "Mr. Emery, the wood is getting so high, I understand you are locating timber

claims up there; is there any chance at all?" "Well," he says, "there isn't much chance; any claim that is of any account," he says, "is gone:" he says, "it has been taken up long ago." He says, "There might be something there yet. I will see you after a while," or some time or another, "and let you know if there is any land to be had." * * * * *

At page 676 the witness testifies:

A. Why, I says for him to wait a few days. I says, "I want to see E. C. Smith, to see if they are loaning any money on Clarkston real estate." I owned a house and lot in Clarkston, and I says to Mr. Smith, "Are you loaning any money on Clarkston real estate? And he says, he would, but he says, "Why not get it over there?" And I says, "I am working for the people over there, and I would rather get it here."

On page 677 the witness testifies:

A. * * * "Well," he says, "how much do you want?" "Well," I says, "about $300.00, and possibly $400.00," I says, "I have some money, but I will let you know how much I want." And then I had no more in regards to getting the money matters — I had no more conversation with Fred Emery till some time before proving up time.

On page 684 the witness testifies:

Q. When did you make your arrangement with Mr. Colby to get the money to make your proof?

A. It was a few days before; I met Mr. Emery, and I says, "Fred"—I told him the circumstances of the bank; the bank wanted to make me a two-year loan, and I says, "I don't know as I will ever want the money that long or not."

"Well," he says, "we don't care to be loaning any money for a year for a small loan like that," he says, "we would like to loan you about $500 for about two years," and I says, "I don't know as I will want it for two years," and I says to Fred, "Is there any way to get the money to pay for the filing now, instead of going to the bank and borrowing the money for two years?" He says, "I don't know; I'll see."

Q. Now, where was this conversation?

A. That was right here in Lewiston.

K. Whereabouts in Lewiston?

A. I think somewheres on the street. I was working at the time and I met him down town. I says, "I can get the money from the Idaho Trust Company by mortgaging my home," and I asked him then if there wasn't private money besides going to the bank, because they wanted to loan it for two years. * * *

Q. How long was that before final proof?

A. I don't think that was much over two or three days.

Q. And then when did he tell you that he would let you have it, or could get it for you?

A. Well, that was—I don't know whether it was the same afternoon or the next day.

On page 695 the witness testifies on cross-examination as follows:

Q. And you had no contract or agreement to sell it to Mr. Emery?

A. No, sir.

Q. Or to Mr. Colby?

A. No, sir.

Q. Or to Mr. Kester or to Mr. Kettenbach?

A. No, sir.

Q. And you had no contract or agreement to sell it before you made the final proof?

A. No, sir.

Q. Now, when was it you concluded to sell your land in relation to the time you made your final proof?

A. I saw my wife at noon, and I says, "I am going to prove up this afternoon," I says, "will you sign a mortgage so we can get the money from the bank?" And I says, I made arrangements with Emery to get the money and we can prove up on it all right." Well, she considered awhile, and then she says, "No, I won't do it," she says, "I won't sign no mortgage." "Well," I says, "what will I do? I will have to prove up this afternoon. I will have to ask Emery if he can sell it for us." And so after we proved up on it I says, "Fred, is there any chance to sell this land now?" He says, "I don't know." He "says, "I can find out." He says, "There is always something selling; perhaps somebody will buy it." He says, "I will see. Maybe it will take a little time." "Well," I says, will you want a mortgage?" "Well," he says, "no." I asked him —requested him to get the money for a few days, until I decided what to do, whether to mortgage the place or not. And so I went and attended to the furnace, and I says, "Fred, if you can find anybody to buy that you go ahead and sell it, because my woman won't sign a mortgage."

Q. Then, the affidavit which you made as follows: "That I have made no other application under said acts; that I do not apply to purchase the land above described on speculation, but in good faith * * * * * " was true, was it?

A. Yes, sir.

It affirmatively appears that the evidence of the entryman Frederick W. Newman not only fails to corroborate the evidence of Clarence W. Robnett, but is in direct conflict therewith, and amply supports the evidence of Colby and of Emery.

CHARLES SMITH.

The evidence of Charles Smith appears at pages 2995 to 3021 of the record, and on page 2996, in response to a question as to how he happened to take up the claim, he states:

> MR. GORDON: Q. Well, now, what else happened? Did you talk with anybody about that?
>
> A. Why, nobody but Ben and I; and then we spoke to Fred Emery about locating us.
>
> Q. Well, now, what did you have to say to Emery?
>
> A. Well, we asked him if he could locate us on a claim, and he said he thought he could, and so he finally did locate us. * * *
>
> Q. Did he say anything else to you except that he could? Was that all that was said?
>
> A. Why, it was all that was said at that time when we first spoke to him; and then we asked him if he would locate us, and he said he would; and so—Oh, it was going on to probably a month during that time from the first time we spoke about it, and he said he would back us up for to get a claim, and he located us.
>
> Q. Now, How do you mean he would back you up? What do you mean by "backing you up?"
>
> A. Well, we really didn't have money enough of our own; at least, I don't think I had; I don't know what was coming to me at the time. We had been—I was to work there, and we would draw money whenever we wanted it, whether it was coming to us or whether it wasn't.
>
> Q. You were married at that time?
>
> A. No, sir.

On page 2998 the witness testifies:

Q. And who paid your expenses of coming from the Clearwater down to Lewiston?

A. I paid them myself.

Q. Where did you get the money?

A. Well, the money I had that I had drawn—wages.

Q. Did you draw it just before you came?

A. Well, I couldn't say as to that. * * *

A. I couldn't say for certain whether I did or not. I never drawed any until I came down here, you know. This was where we always drawed our money, in Lewiston.

On page 3005 the witness testifies:

Q. Now, when was it you had the talk about getting the money to make proof?

A. Well, that was some time between the time I filed and proving up, I don't remember the time.

Q. Now, what was said about it?

A. Well, there wasn't any more said than I asked Fred if he would let me have the money, enough to prove up on it, and he said he would if he could, but he was a little short at the time, if I can remember, but he said he would if he could. He said, if I remember right now, that he would if he could make out; he was a little short of money himself at the time.

On page 3018 the witness testifies on cross-examination:

Q. As I understand you, Mr. Smith, there was no understanding or agreement between you and Mr. Emery or Mr. Colby, or anyone, that you should sell your land, before you filed on it?

A. No, sir.

Q. And no understanding or agreement that you should sell your land, before you made your final proof?

A. No, sir.

Q. And you had no talk with Mr. Kester or Mr. Kettenbach regarding the sale of your land, before you filed on it, or before you made your final proof?

A. No, sir.

The witness also states that the affidavit he made at the time he filed his sworn statement, was true.

CHARLES DENT.

The evidence of the witness Charles Dent appears on pages 716 to 736 of the record, and we quote therefrom as follows:

A. Mr. Emery was locator at that time, and he asked me if I had ever taken a claim, and I told him no, and he wanted to know why I didn't take one. Well, I told him I didn't know as I had much use for one; I couldn't sell it. "Oh, yes," he said, "I could sell a claim most any time." So I concluded I would take one. (Pages 718-719).

Q. Did he tell you how much the claim would net you?

A. Oh, I told him if I could get $100.00 for the claim I wouldn't mind taking one. "Well," he says, "you can easy enough get $100.00." He says, "Most anybody will give you $100.00 for it."

The witness testifies, on cross-examination, at page 733, as follows:

Q. Mr. Dent, I understand your first conversation with Mr. Emery was at your place, was it?

A. Yes, sir.

Q. What was that conversation, as near as you can remember?

A. Oh, I don't know; there wasn't much of a conversation about it. He was locating people up there, and we just got to talking about it, about talking up claims, and he says to me, he says, "You have never taken one up, have you?" And I says, "No." And he says, "Why don't you take up a claim?" And I told him I didn't know, I didn't know as I could sell it if I did take one up, and he says, "Well, you could easily enough sell it for $100.00," he says, "anybody most would give you $100.00 for it." Well, I told him I thought if I could get $100.00 I would take up a claim, but I didn't want to take up a claim and hold it, because I didn't want to pay the tax on it and I didn't know when I could ever sell it.

Q. You meant if you could get $100.00 over and above what the claim cost you?

A. Yes.

Q. There was no understanding or agreement with him that you was to sell your claim to him, was there?

A. Oh, no.

Q. Or to anyone else?

A. No.

Q. When was your next conversation with him; the next conversation I believe was when you asked him if you could borrow the money to prove up on, or something to that effect?

A. I told him I didn't have the money, and he said they could let me have the money if I needed it, Colby said; and he owed me about $60 or $70 then, Emery did, but he didn't just have

it with him, so when I come down there I seen Mr. Colby, and he let me have the money.

On page 735 the witness testifies:

Q. * * * Now there was no understanding or agreement between you that you was to sell your land at that time, was there?

A. Oh, no, no. * * *

Q. Then, what conversation did you have in regard to the claim, after you made your final proof?

A. I didn't have no conversation much; I just told Mr. Colby I would sell him the claim, and he said all right.

Q. Did you tell him what you would sell it to him for?

A. Yes.

Q. How much?

A. I told him if he would give me $100.00 and pay me what it cost to prove up, he could have the claim.

Q. That was the first talk you had with either Mr. Colby or Mr. Emory regarding the sale of your claim?

A. Yes, sir.

Q. You had then proved up and had your final receipt, had you?

A. Yes.

The witness also states, on pages 735-736, that the affidavit he made at the time he filed his sworn statement, is true.

LON E. BISHOP.

The evidence of Lon E. Bishop appears at pages 2976 to 2994 of the record. At page 2981 the witness testifies:

> MR. GORDON: Q. And did you talk with Mr. Emery about getting the money, or with Mr. Colby?
>
> A. Well, I spoke about that we would have to have a settlement so I could get the money to prove up with.
>
> Q. Now, who did you talk with about that?
>
> A. I talked with Mr. Emery about it.
>
> Q. What did Emery say?
>
> A. He said he would settle up with me, and he would give me the money.
>
> Q. Now, what settlement was it you were to have?
>
> A. Well, I was working for him, you know, and I had worked for him quite a while, you know, and he had given me money along.
>
> Q. Now, how much actual cash did you get that day from Colby?
>
> A. Why, I got $400.00.
>
> Q. And how did you happen to get it from Colby? Did he owe you any money; or was it Emery that owed you the money?
>
> A. Well, it was Emery. They were all connected together.
>
> Q. Did you have any talk with Mr. Colby about it at all?
>
> A. No.
>
> Q. And where did you get the money from Mr. Colby?
>
> A. Out here on the street.

At page 2990 the witness testifies on cross-examination as follows:

Q. Mr. Bishop, did you have any talk with Mr. Kettenbach, or Mr. Kester, or either of them, concerning the sale of your land, before you made your final proof?

A. No, sir.

Q. Did you have any talk with Mr. Colby, or Mr. Emery about the sale of your land, before you made your final proof?

A. No, sir.

Q. When did you first conclude to make a sale of your land, in relation to the time you made your final proof?

A. Well, after I proved up.

Q. And who did you first talk with about the sale of your land?

A. Why, Emery.

Q. With Mr. Emery?

A. Yes, sir.

Q. And what did he tell you?

A. He told me that Kettenbach would buy.

Q. Did he tell you what he would give you for it?

A. No.

Q. And then, you had a talk with Kettenbach about it, did you?

A. Yes; I went over to see him.

Q. You went over to see him?

A. Yes, sir.

Q. And it was then you agreed on the price?

A. Yes.

Q. And then he told you to make out the deed?

A. Yes.

Q. And you made out the deed, and went over and had the deed made out?

A. Yes, sir.

Q. And executed it, and brought it back, and gave it to Mr. Kester, who was the cashier of the bank?

A. Yes, sir.

Q. And you told him that you was to get $650.00 for it?

A. Yes.

Q. And he told you that was right?

A. Yes.

Q. Now, you stated that you paid back to Mr. Emery the money that you had borrowed from him. How much money had you borrowed from him?

A. Well, I don't remember just how much I did get from him. He owed me, and after I got this money, why, then I owed him.

Q. And I believe you said that you told him that you wanted to settle up, so that you could get the money to make your final proof with? You wanted the money to make your final proof with?

A. Yes.

Q. And you had a settlement, did you?

A. Well, he just gave me the whole amount, you know, and then I told him that I wanted to settle up, and he just gave me the amount.

Q. Gave you the amount?

A. Yes.

Q. And then when you paid him back it was determined then how much money he owed you before he let you have the $400.00, was it?

Q. That is, determined how much money you had coming to you from him?

A. Yes.

Q. And then it was also determined how much money you owed him after he let you have the $400.00?

A. Yes. * * * * *

At page 2992 the witness testifies:

Q. And you had no understanding or agreement with Mr. Emery that you would sell him the land, before you filed on it?

A. No.
Q. Or before you made your final proof?
A. No.

The witness also testifies, at page 2993, that the affidavit he made at the time he filed his sworn statement, was true.

It affirmatively appears from the evidence of this witness that he had no understanding with anyone for the sale of the land prior to the time he made his final proof, and it was after he made his final proof that he concluded to sell.

At pages 284-285, relative to these entries, Judge Dietrich in his opinion states:

> "There is no contention that Kettenbach and Kester had anything to do with the entries until about the time of final proof, when, at the solicitation of Colby, they agreed to advance the money, and thereafter, closely following the final proof, they purchased the claims; it is obvious therefore that they could not have had any unlawful agreements with the entrymen. The theory of the government, however, is that such agreements had been entered into with Emery and Colby, or one of them, and that the defendants were advised of such agreements before they purchased the lands. Aside from the testimony of Robnett, there is no direct or positive proof that any one of the claims was invalid, and while the conditions surrounding the transfer are of such a nature as to warrant a close scrutiny of the claims, the circumstances are quite as readily reconcilable with the theory of the lawfulness as with the theory of the un-

> lawfulness of the relations existing between the several entrymen and Emery and Colby. It is conclusively shown, I think, that in material respects Robnett's account of what occurred in the bank is incorrect, and I am convinced that the witness Colby truly states how Kettenbach and Kester came to purchase the claims. Upon the whole , it is thought that the evidence is insufficient to warrant a cancellation of any one of these patents.

We have heretofore stated that each and all of the entrymen were and are in conflict with Robnett; that Colby and Emory are in conflict with Robnett, and Judge Dietrich prefers to believe these witnesses instead of believing Robnett, and held the patents intact.

We most respectfully pray that a rehearing be granted in relation to these entries, to-wit, the entries of Lon E. Bishop, Frederick W. Newman, Charles Dent and Charles Smith.

In connection with these entries we call the Court's attention to the authorities cited under "Points and Authorities, II," pages 219-224 of our original brief, and we call the Court's attention aspecially to the case of *United States vs. Stinson,* 197 U. S., 200-204; 49 L. Ed. 724, in which the court says:

> "2. The government is subject to the same rules respecting the burden of proof, the quality and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual.'

Quoting from the *Maxwell Land Grant Case*, 121 U. S. 325; 30 L. Ed., 949, the Court in the Stinson case (Supra), says:

> "It should be well understood that only that class of evidence that commands respect, and that amount which produces conviction, shall make such attempt successful."

In *Colorado Coal & Iron Company vs. United States*, 123 U. S. 307, 31 L. Ed., 182, the Court says:

> "It thus appears that the title of the defendants rests upon the strongest presumptions of fact which, although they may be rebutted, nevertheless can be overthrown only by full proofs to the contrary, clear, convincing and unambiguous."

It thus appears in the cases hereinbefore referred to, that the evidence is far from being clear, convincing or unambiguous; save and except that it occurs to us it is clear, convincing and unambiguous in favor of the appellees; and upon the evidence alone the patents should not have been cancelled.

We also call the Court's attention to a point made in our original brief: —that the Court below saw the witnesses in two other trials, observed their manner of testifying, had a better opportunity to understand the facts and circumstances surrounding their evidence, and, after seeing the witnesses and hearing them testify, the lower court found in favor of the ap-

pellees and against the contentions of the appellant; and we again call the Court's attention to the case of the *State of Idaho vs. Baird*, 13 Idaho, 126; 89 Pac. 298, wherein the Court says at page 137 of the Idaho Reports:

> "It is urged, however, that the case was tried by the Court, upon the evidence taken by the stenographer at the former trial, and that the Court had no witnesses before it and for that reason the rule last above stated does not apply herein. This Court has held that that rule did not apply when the trial Court heard the case on written or documentary evidence, but it will be observed in this case that the Judge who decided this case sat at the former trial and heard the witnesses testify, and, no doubt, observed their demeanor on the stand, and, if that be true, the rule first above stated would apply.'

II.

WILLIAM McMILLAN.

The entry of William McMillan is in no way connected with the evidence of Clarence W. Robnett, it appearing affirmatively from the evidence that Robnett had nothing to do with the entry, and the evidence of this witness would have no bearing upon the same.

We call the Court's attention to the evidence of William McMillan, appearing at pages 532 to 551 of the record. At page 534, the witness testifies that he had a conversation with George H. Kester concerning the taking up of a timber claim:

> Q. Well, what was Mr. Kester's business there at that time?
>
> A. Well, his business, he was up in the upper country some way, and he was well acquainted with me, and he was up in there and it was a nigh cut across that way to Orofino, and he rode past there and called in to see me.
>
> Q. When was this conversation?
>
> A. It was in October, 1904, I think. * * *
>
> Q. Now, what did Mr. Kester say?
>
> A. Why, he asked me something about whether I had used my right for a timber claim, and wasn't I going to take one, and I told him I hadn't. I didn't know anything about timber claims at that time. I told him I hadn't, and told him that I didn't have money enough to take one without mortgaging my place, and I told him I wouldn't do that, and so he said if I took a notion to take one if I needed a little money he would help me out, which he did. I had part of the money but I didn't have enough.
>
> Q. Did you ever see him again or talk with him again before you filed on your claim?
>
> A. No, I didn't. I never seen him till after I had filed on my claim. * * * * *

On page 535 the witness testifies that he had made arrangements with Mr. Dwyer to locate him on the land, and on page, 536, in response to a question, the witness testified:

Q. Was there anything said to you about the value of the claim?

A. No; but he told me I would be safe enough in taking one, if I could raise the money to prove up; it would come in the market pretty soon. There wasn't any timber claims hardly selling at that time.

Q. Did he tell you that he would insure you so much money over and above expenses?

WITNESS: Well, he said I would be safe enough; that I could make $100.00 or $150.00 for it anyhow—safe enough to take one.

MR. GORDON: Q. Now, how did he express that?

A. Why, he said that I would be safe enough, you know; something to that effect; I couldn't just tell you word for word now.

Q. Well, what was that about the $1.00.00 or the $150.00?

A. Well, that he was pretty sure I could make that much out of it above expenses, and I was well satisfied with that at that time, if I could make that much. I didn't know whether I could make it or not. I was pretty sure I could make that, or he wouldn't have told me I could make that much.

Q. Did you know of anyone at that time that was buying claims?

A. No, I didn't. I knowed some of them had claims that couldn't sell them.

Q. Did you have any understanding or agreement with Mr. Kettenbach, or Mr. Kester, when you first talked with him, as to whether you were to turn that claim over to him?

A. I did not.

Q. Or to anyone he told you to?

A. I didn't have any agreement.

Q. Did you have an understanding?

A. Well, no, I don't know that I had any understanding. I understood that I could turn it over to him if I had a mind to, but I could turn it over to anybody else. I wasn't forced to turn it over to him.

Q. Well, was it your understanding when he made the agreement with you that he would furnish you the money, that you would turn it over to him?

A. No, there was no such agreement as that at all.

Q. What's that?

A. No, I didn't make any such agreement as that at all, whatever.

Q. Well, what did you expect to do with that claim when you took it up?

A. I expected to sell it as soon as I could and get what I could out of it.

Q. And who did you expect to sell it to?

A. Well, I expected to sell it to whoever would buy it. Of course, he told me about it, and I would give him the preference.

Q. But that is what you expected to do when you had your first talk with him and when you came to the conclusion that you would take it up?

A. When I had my first talk with him I didn't have much idea, and I thought it over for a day or two, and then I thought I would.

The witness then states that a man by the name of Bliss located him on the land, and that Mr. Dwyer made arrangements with Mr. Bliss to locate him.

On pages 540-541 the witness testifies to the manner in which he procured the money to make his final

proof, and in response to questions, the witness testifies:

Q. Do you remember whether or not you saw Mr. Kester then, before you made your final proof?

A. Yes, I seen him.

Q. Where did you see him?

A. I seen him at the bank where he worked at the time.

Q. Right in the bank?

A. Yes.

Q. And what was your conversation with him then relative to this claim?

A. Why, nothing more than I told him, I says to him I had taken a claim and I haven't got money enough, and he says, "I will help you out," and he wanted to know how much it was, and I told him how much I wanted. In fact, he told me when I first seen him that he would help me out, and he didn't go back on his word.

Q. Now, do you remember how much you got on that occasion?

A. I think I got about $300.00, something like that. I had something over $100.00 of my own. It took $400.00 to prove up on, and I had something over $100.00.

Q. Was that the same day that you made your proof? * * *

A. Yes. I came in on the train and proved up the same day.

Q. And did you give Mr. Kester a note?

A. I did not. He didn't ask for any.

Q. You say you didn't, and he didn't ask for one?

A. No. * * * *

On page 549 the witness testifies on cross-examination that he sold the land nearly two years after

he made his final proof; that there were no buyers in the field, and no one offered to purchase the same; that he used $100.00 of his own money to pay the purchase price; that the balance of the money he borrowed from Mr. Kester; that he told Mr. Kester he would pay it back when he sold his claim; that he had no contract or agreement for the sale of the land prior to the time he made his final proof, and that the affidavit he made at the time he filed his sworn statement, that he had no agreement to sell the land, was true.

On page 351 the witness testifies that he did not feel that he was under any obligations to sell the land to Mr. Kester, except that he should give him a preference right to purchase it; and that he did not feel that Mr. Kester was under any obligations to purchase the land.

It affirmatively appears that Mr. McMillan was entitled to exercise his stone and timber right; that he filed upon the land, used $100.00 of his own money to pay the purchase price, and borrowed the remainder from Mr. Kester to pay for the land; that he kept the land for two and a half years after making his final proof, and finally sold the same to Kitty E. Dwyer. The record does not contain the slightest in-

timation of an agreement to sell his land prior to final proof, or for two and a half years thereafter.

In relation to the entry of McMillan we also call the Court's attention to the opinion of Judge Dietrich, appearing on page 296 of the record, wherein, after a careful consideration of all of the evidence bearing upon the entry, Judge Dietrich states:

> "There was some sort of a general promise by Kester, who seems to have been very friendly to the entryman, to give him assistance if he needed financial help when it came to making his final proof. A careful consideration of the entryman's testimony convinces me that he did not have any understanding, express or implied, by which he was to sell the land to any person, and that no other person had any interest in the entry. The entryman apparently did feel under some moral obligation to give to the defendant Kester an opportunity to purchase, but such obligation involved only a recognition by the entryman that Kester favored him by loaning him a part of the money required for the final proof."

From Judge Dietrich's knowledge of the case, and his acquaintance with the surrounding circumstances, he was not convinced that the evidence was clear, convincing, conclusive and unambiguous, and held that it did not come within the rule laid down by the Supreme Court of the United States, defining the nature of the evidence necessary to justify the concellation of a patent.

We are convinced that a re-consideration of this evidence and a re-examination of Judge Dietrich's opinion in relation thereto, will convince the Court that it did the defendant Kitty E. Dwyer an injustice in holding for cancellation this entry.

III.

In relation to the remaining patents, Carrie D. Maris, John H. Little, Ellsworth M. Harrington, Bertsal H. Ferris, George Ray Robinson; also Soren Hansen, Drury M. Gammon, David S. Bingham; Charles E. Loney, Mary A. Loney, Frank J. Bonney, James T. Jolly, Effie A. Jolly, Charles S. Myers, Janie Myers and Clinton E. Perkins, we call the Court's attention to our original brief in relation to these entries, and references to the record therein made; that of eBrtsal H. Ferris, appearing at page 23 of our brief, and wherein the said Bertsal H. Ferris testified that he kept his land two or three years after he made his final proof before he sold the same; that the first agreement he made in relation to the sale of his land was when he agreed to sell it to Kettenbach two or three years after making his final proof; that he tried to sell it to other parties, and at one time gave an opinion to Fred Emery.

GEORGE RAY ROBINSON.

The evidence of George Ray Robinson appears at pages 25 to 27 of our original brief, and we would call the Court's attention to the evidence of George Ray Robinson, appearing on page 27 of our original brief, (pages 1341-1342 of the record), wherein the witness testifies that he remembered of Mr. Kettenbach talking to him on the street concerning the payment of his note, and that Mr. Kettenbach urged him to keep his land, and pay the interest, or the principal in $5.00 payments; and that Mr. Kettenbach wanted him to pay $5.00 per month; that he told Mr. Kettenbach that he could not sell his land to anyone else, and that Mr. Kettenbach told him, if he was not satisfied to keep the land, he would look over the papers and see how much he could allow him for the claim; that he had carried his note then upwards of two years.

If it be a fact that William F. Kettenbach or George H. Kester was endeavoring to acquire this land, he would not have reluctantly purchased it at the price it was offered, and especially when he was paying more for the land than it could be sold for to anyone else.

Concerning the entries of Bertsal H. Ferris and George Ray Robinson, Judge Dietrich in his opinion,

at pages 321-325, discusses the evidence in relation thereto, and on page 322 Judge Dietrich states:

> "It is abundantly shown, I think, that there was no intention on the part of the entrymen until long after final proof to convey to Kettenbach, and that there was no expectation on the part of Kettenbach, when he left Robnett or the entrymen have the money, that he would secure title to the lands. The entrymen, as appears from the dates of the deeds, held the lands a considerable length of time, and transferred them to Kettenbach because they were unable to do any better with them. Ferris realized nothing out of the transaction, and apparently lost some personal expenses. Robinson netted approximately $70.00. It is also plain that Robnett felt under no obligation to purchase the land and exercised no real control over the sale thereof. The understanding, as I gather it from all of the evidence and the circumstances disclosed by the record, including the statements of the several parties, is that Robnett, in encouraging these men to make entries, led them to believe that he would be able to negotiate a sale of the lands after title was secured, so that they would realize a substantial profit, and in that belief they entered the lands and assumed the mortgage obligations referred to."

CARRIE D. MARIS.

The evidence of Carrie D. Maris appears at pages 6 to 11 of our original brief, and we call the Court's attention to page 8, wherein the witness testifies to the repeated efforts Robnett made to sell her land

to other parties, and wherein Robnett called up a man at Moscow who claimed he was ready to purchase the land; and, after repeated efforts, it was finally sold to Kester and Kettenbach, who paid a higher price for the land than Robnett was able to sell it for to anyone else.

We also call the Court's attention to Robnett's affidavit, portions of which are copied on page 10 of our original brief, wherein Robnett testified that no prior agreement existed between himself and Carrie D. Maris, and that no arrangements whatever existed between himself and George H. Kester and William F. Kettenbach for the purchase of this particular claim for more than a year after final proof was made.

In his opinion, at pages 305 to 308 of the record, Judge Dietrich discusses the evidence in relation to this claim, and on page 307 the Court states:

> "As already stated, it is impossible to read the testimony of the entryman without being impressed with the fact that, for a long period of time before the sale to Kester and Kettenbach, Robnett had been making strenuous efforts to dispose of the land, but in vain. Apparently the highest offer he had ever received was $1,500.00. Under these circumstances it seems quite incredible that he, as the owner of this land, and being anxious to sell it and get as much as possible for it, and having been unsuccessful in selling it to strangers, would go to Kester and Ket-

tenbach and lay bare the facts disclosing the invalidity of the title, for the purpose of inducing them to pay $100.00 more than he had ever been offered for the land. Only great simplicity of character, together with a highly sensitive conscience, would account for such an unusual proceeding, and it is hardly necessary to add that Robnett seems to have possessed neither these qualities in a very high degree."

The discussion of Judge Dietrich in relation to this entry is very interesting in view of the fact that Robnett had made an affidavit as late as July 1st, 1909, (appearing at page 10 of appellees original brief) in which he stated under oath that no agreement existed between Carrie D. Maris and Kester and Kettenbach for the sale of the land prior to the time final proof was made, and that no relations existed between him, Robnett, and Kester and Kettenbauch, concerning the sale of the land, prior to final proof.

JOHN H. LITTLE.

The evidence of John H. Little appears at pages 12 to 15 of our original brief, (pages 1609 to 1627 of the record), and we would especially call the Court's attention to the evidence of Mr. Little, wherein he stated that Robnett never mentioned the names of Kester and Kettenbach as being parties who were

prospective purchasers of the land, and, on page 14, Mr. Kettenbach told the witness to try to sell his land to some one else; that he did try to sell to other parties, but was unable to do so; that his arrangement with Robnett was not carried out; that Kettenbach told the witness that he had nothing to do with Robnett.

On page 15, the witness testifies that he had no contract, understanding or agreement with Mr. Kettenbach, Mr. Kester, or Mr. Dwyer, prior to the time he made his final proof.

Judge Dietrich refers to the claim of John H. Little in his opinion, at pages 318-321; and on page 319 the Court says:

> "As already noted, Robnett does not testify that he was to control the sale of the land, and if he was to have the control and disposition of it, it would be strange if the amount which the entryman was entitled to realize was left in such an indefinite status. From Robnett's testimony it appears that when the arrangement was made for this entry the money for the purpose was to be procured from Curtis Thatcher, who advanced a small amount for the payment of preliminary expenses, but then, for some reason, did not carry out his agreement. Upon initiating the entry, and before final proof, Little gave a note for the location fee, amounting to either $125.00 or $150.00, according to Robnett's testimony. This was afterwards taken care of by the money procured from Kettenbach. Acording to Robnett's testimony, which is in

harmony with that of Kettenbach and Little, Kettenbach originally had no interest in the entry, and had no expectation of getting the title. He (Robnett) testified:"

"'Q. Now, what became of that claim, do you know?'"

"'Q. It was finally deeded to Mr. Kettenbach.'"

"'Q. Do you remember the transaction in connection with that, the conversation relative to it?'"

"'A. Why, the deal failed to go through that I had at the time of the location, and of course the mortgage came due, and Mr. Kettenbach told Mr. Little that he would have to either pay the mortgage or deed the claim, and he deeded the claim.'"

"Robnett testifies in general language that Kettenbach and Kester knew of the arrangement he had with Little, but he does not say what he told them or in his conversation with them what arrangement he claimed to have had with Little. The entryman appears to have testified frankly, and as to his arrangement with Robnett he said:

> "'Q. Now, what were you to do with this claim after you took it up, what was your arrangement?'"
>
> "'A. Well, the understanding was that Robnett was to find me a buyer for the claim. He guaranteed to sell me the claim —to sell the claim for me.'"
>
> "'Q. Did he tell you when he would sell it?'"
>
> "'A. Why, he said the chances were favorable for an early sale—a verbal agreement was all.'"
>
> "'Q. Did he tell you whether or not he

had anybody in mind or was assembling claims?' "

" 'A. No, not at that time he didn't, not until after we had proved up, before he made any statement in regard to assembling claims.' "

" 'Q. Now, did he tell you how much you were to get out of your claim? This is the first talk you had with him before you filed?' "

" 'A. Well, when we came back he told me what a valuable claim I had got. I don't remember the amount, but he discussed it, and I felt very jubilant over the fact that I had got a good claim. I had taken his word for it all.' "

"If the entryman had an agreement by which he was to get only a small specified amount out of the claim, his state of mind upon being informed that he had a good claim is not easily explained. He would have had no very great interest in the nature of the claim if he was guaranteed so much and was to get only so much out of it. The entryman further testifies that Robnett disappointed him in not getting a purchaser for the claim, and that Kettenbach was urging the payment of the mortgage and was threatening to foreclose. He went to Kettenbach and tried to induce him to purchase the claim. Kettenbach told him he was not buying timber, and advised him to try to sell to someone else, but finally took the claim and paid him a trivial amount in excess of what was due upon the mortgage.' "

"I conclude that the evidence does not support the charge that there was any fraud in the original entry, or that Kettenbach at the time he purchased had knowledge of any alleged

fraudulent agreement between the entryman and Robnett."

We feel that a reconsideration of this entry, and a reexamination of the evidence in relation to the same, will convince the Court that this patent should not be cancelled, and that an injustice is being done the defendants in the cancellation of this entry.

We respectfully pray for a rehearing and a reconsideration of the evidence in relation to this entry.

ELLSWORTH M. HARRINGTON

The evidence of Ellsworth M. Harrington appears at pages 15 to 17 of our original brief, (pages 1355 to 1360 of the record) wherein the witness testifies that Robnett was not to sell the land for him, but in case he did sell it he was to receive a commission; that no agreement existed for the sale of the land.

"Q. You mean you didn't have any written agreement?"

"A. No, nor no verbal agreement in that way; not positive. He was dealing in timber claims, and if he had a chance to sell it, he had my permission to sell it."

The witness also testifies that he had no arrangements with either Kester or Kettenbach to purchase the land.

We call the Court's attention to the opinion of Judge Dietrich in relation to the entry of Ellsworth

M. Harrington, appearing at pages 313 to 316 of the record.

On page 314 the Court states: (Beginning at bottom p. 313).

> "According to Kettenbach's testimony, he took the mortgage and finally purchased the claim practically under the same circumstances as are shown to have surrounded the mortgages upon, and the purchase of, the Long claims. Harrington himself testifies, and his statement is not disputed, that he realized clear out of the claim $299.40, and so far as appears Robnett got nothing except the location fee and possibly the bonus or a part of the bonus included in the mortgage note. It is quite clear that Kettenbach had no understanding before or at the time he took the mortgage that he was ultimately to procure title to the land, for efforts were made by Robnett and Harrington to sell to other parties, and, being unsuccessful, the entryman sold to Kettenbach."
>
> "The only evidence relative to the regularity of the entry is found in the testimony of Robnett, already referred to, and that of the entryman. The entryman's version of the arrangement between himself and Robnett is materially different from that of Robnett, and, if true, there was no unlawful or improper agreement or understanding. The entryman appears to have testified with considerable candor. In reply to questions put to him by counsel for the government he testified that prior to making the entry there was nothing said as to what he would make out of the transaction or about the sale of the land. He said:
>
> " 'Q. Was anything said about what the land was worth?' "

"'A. There may have been; I don't remember; I think there was though. I think it was in the neighborhood of $1,000.00; I ain't positive though."

"'Q. Now, what was said? Was it said that you could get $1,000.00 out of it?'"

"'A. Well, no. He (Robnett) may have said it was worth in that neighborhood, of $1,000.00; there was nothing said positive that it was.'" * * *

"'Q. Now, what was there in it for him?'"

"'A. Well, he was to get a commission out of it for selling the claim, I think.'"

"'Q. And he was to sell the claim?'"

"'A. No, he wasn't to sell it. If he did sell it he was to get a commission for selling it. There wasn't no agreement that he was to sell it.'"

On page 316 the Court states:

"I conclude that the record does not sustain the contention either that the entry was invalid or that Kettenbach, at the time he made the purchase, had notice of any alleged invalidity."

SOREN HANSEN.

The evidence of Soren Hansen appears at pages 100 to 105 of our original brief, and we would especially call the Court's attention to the evidence of this witness, wherein he testifies that Robnett told the witness he ought to get from $300.00 to $500.00 out of the place, and he could receive that when he sold the land:

"Q. How were you to get the three or five hundred dollars out of it."

"A. Why, when he sold it. He said he would be able to sell it; he had more claims, and he would be able to sell it for me."

The witness also testifies to the several deeds he executed, and also states that he had no understanding or agreement with either Kester or Kettenbach for the purchase of the land.

We also call the Court's attention to the evidence of William F. Kettenbach upon this same question, appearing at pages 1689 to 1691 of the record; also to the evidence of E. N. Brown, appearing at pages 1667 to 1687 of the record.

The evidence falls far short of being clear, conclusive and unambiguous, and is in direct conflict with the evidence of Clarence W. Robnett.

DAVID S. BINGHAM

The evidence of David S. Bingham appears at pages 126 to 130 of the appellees' brief, and at pages 1139 to 1171 of the transcript, and on page 127 of our original brief, we copied the evidence of the witness relative to the manner in which he took up his timber claim, and wherein the witness testifies that he never talked with Kettenbach, Kester or Dwyer concerning the taking up of the land; that he trans-

acted his business with Mr. O'Keefe; and the only understanding he had with Mr. O'Keefe, relative to this land, was that Mr. O'Keefe was to have the prior right of buying it when the witness proved up.

On pages 128-129, of our original brief, the witness testifies to his negotiations with Mr. O'Keefe relative to the sale of the land, and that there was a ten-acre tract in Cloverland Orchard Tracts which the witness desired to purchase, and by making a sale of his land at that time, he could purchase this tract of land. The evidence of the witness is very clear that O'Keefe and the witness arrived at an agreement for the purchase of the land at that particular time, and this was in the neighborhood of two years after the witness had made his final proof.

In relation to the entry of David S. Bingham, Judge Dietrich in his opinion, at pages 342 to 349, gives a very clear statement of the circumstances surrounding the evidence in relation to this entry, and at page 345 of the record quotes the evidence of the entryman in relation to his entry and his final proof, and at page 349 states:

> "Clearly such testimony, with its apparent inconsistencies and contradictions, cannot be taken as satisfactorily establishing the affirmative proposition that there existed between the entryman and O'Keefe at the time entry was initiated any understanding or agreement upon

> the part of the entryman that he was to sell to O'Keefe or to sell to any person for any fixed price. An understanding by an entryman that if he sold he would give the first opportunity to a designated person to purchase, provided such person would give as much as anybody else, does not constitute an agreement obnoxious to the statutes pertaining to the entry of timber lands."

It will also be observed that Jackson O'Keefe was dead at the time of the hearing; his evidence could not be produced, and the defendants were at a disadvantage in proving conclusively that there was no fraud or irregularity in connection with this entry.

We believe that upon a reexamination and a rehearing upon this entry, the Court will be convinced that this patent should not be cancelled.

IV.

THE STEFFY GROUP.

This group includes the entries of Charles E. Loney, Mary A. Loney, Frank J. Bonney, James T. Jolly, Effie A. Jolly, Charles S. Myers, Janie Myers, and Clinton E. Perkins.

We can add but little to what we have heretofore said on pages 69 to 92 of our original brief, and we most respectfully call the Court's attention to the

argument and quotations from the evidence appearing thereat; and believe that a re-examination of the record in relation to these entries will convince the Court that the defendants Kester and Kettenbach had no knowledge of the manner in which the claims were acquired, or of any irregularity in connection therewith; and we most respectfully request that a re-hearing be granted in relation to these claims.

We also desire to call the Court's attention to the verdict of the jury, appearing at page 4180 (bottom) of Vol. XI. of the records, wherein the defendants were acquitted upon the charge of conspiracy in relation to the acquisition of title to the lands involved in this proceeding. Almost all of the entries referred to herein were involved in those indictments, and those entries not specifically referred to in the indictments were referred to in the evidence, and the witnesses appeared and testified in relation thereto, which has as much force as if they had been set out and specifically described in the indictments. We are firmly of the belief that this verdict of acquittal by a jury should have great weight with the court, and especially so when the trial Judge who saw the witnesses, and observed their manner of testifying, also found in this case in favor of the defendants in relation to these particular entries. Vol. XI, Page 4180 (bottom).

V.

DRURY M. GAMMON

We have referred to the entry of Drury M. Gammon at pages 113 to 114 of appellees brief, and we can add little to what we have there said; but we are convinced that a re-examination of the record, and of the evidence of Drury M. Gammon, will convince the Court that this patent should not be cancelled.

It is unreasonable to assume that Robnett would advise the officers of the bank of the irregular manner in which the title to this tract of land was acquired. It was to his interest to keep it secret, and to prevent the officers of the bank from obtaining knowledge of the same.

We respectfully submit that a re-examination of the evidence and of appellees' brief in relation to this entry will convince the Court that the patent should not be cancelled.

Your petitioners severally pray, therefore, that an order may be made and entered for a re-hearing of the argument in this cause, on a day to be appointed by this Court, at the present term, and upon such points as the Court may direct.

WILLIAM F. KETTENBACH and
GEORGE H. KESTER.
By GEO. W. TANNAHILL,
Residing at Lewiston, Idaho,
Their Counsel.

GEO. W. TANNAHILL,
Residing at Lewiston, Idaho.
Attorney for petitioners for whom he appears.

JAMES E. BABB,
Residence: Lewiston, Idaho,
Attorney for petitioners for whom he appears.

The undersigned, attorneys for petitioners, DO HEREBY CERTIFY: That in their judgment the foregoing petition for a re-hearing is well founded, and that it is not interposed for delay.

Dated this 12th day of November, A. D. 1913.

GEO. W. TANNAHILL, and
JAMES E. BABB,
Counsel for Appellees.